No. 21,741

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ANACONDA COMPANY,

Appellant,

vs.

GREAT FALLS MILL AND SMELTERMEN'S UNION NO. 16 of the INTERNATIONAL UNION OF MINE, MILL AND SMELTERWORKERS and THE INTERNATIONAL UNION OF MINE, MILL AND SMELTERWORKERS,

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

On September 29, 1965, the Appellees herein, plaintiffs below, filed a complaint in The United States District Court for the District of Montana seeking to enforce an arbitrator's award issued in favor of plaintiffs and against the Appellant, The Anaconda Company. (Tr. p. 4.) The Court below had jurisdiction of the subject matter as the complaint was founded upon Section 301 of the Labor-Management Relations Act of 1947—29 U.S.C. Section 185. After a pre-trial conference each side filed a motion for Summary Judgment. (Tr. pp. 67 and 76.) The

Court below entered Judgment in favor of plaintiffs (Tr. p. 87) and the defendant, The Anaconda Company, appealed (Tr. p. 89). This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF CASE

This case arises from a dispute between the Appellant and certain of its employees, represented by the Appellees, over whether they were recalled to work properly following a wildcat strike in 1964 which forced closure of the Appellant's refinery at Great Falls, Montana, for a brief period.

The dispute stems from an incident occurring in January, 1964, following a breakdown in negotiations on rates of pay for employees engaged in the operation of a new vertical shaft furnace at Appellant's Great Falls plant when men assigned to this task declined to work and were discharged. Other employees struck in sympathy, a shutdown of operations resulted and was followed on January 31, 1964, by a written settlement of the strike which did not provide for order of recall of employees.

After settlement of the strike the Company, in an effort to get in production as rapidly as possible, recalled certain maintenance and repair workers to work ahead of some production workers of greater seniority. A grievance arose when these workers complained that they should have been recalled ahead of the maintenance and repair men although their tasks could not commence until the shut-down ma-

chinery and plant had been returned to operating condition.

When the grievance was not satisfactorily settled, the matter was submitted to arbitration before Mr. Thomas Tongue who was selected from a list of arbitrators supplied by the American Arbitration Association. (Tr. p. 5.)

The arbitrator was submitted the following question:

> "Did the Company violate the seniority provisions of the collective bargaining agreement in recalling and assigning employees to work between January 30th and February 12th, 1964."

He found that although the collective bargaining agreement (a copy of which is attached to Appellant's answer [Tr. p. 52]) speaks of recall after *layoffs* (emphasis added), there are no specific provisions relating to order of recalling employees after strikes (Tr. p. 7).

He then relied upon statements by union witnesses that the defendant's plant superintendent had said in response to union queries that the recall would be by departmental seniority to hold that because this was said it meant that the superintendent so interpreted the collective bargaining agreement and that therefore the company must be held as having so interpreted the agreement. (Tr. pp. 8 and 9.)

He also placed stress on the 1959 post-strike practice of recalling men in order of departmental seniority to reach his conclusion. (Tr. pp. 8 and 9.)

The arbitrator then gave his award as follows:

"Award

Based upon the considerations set forth above and good and sufficient reasons appearing therefor, it is the decision and award of the undersigned arbitrator as follows:

1. The company violated the seniority provisions of the collective bargaining agreement in recalling and assigning employees to work between January 30 and February 12, 1964, in that employees should have been recalled to work during the foregoing period in order of departmental seniority, but were not always recalled in that order.

2. The parties, in accordance with their stipulation of record, are to work out details relating to payment of back wages to any employees who were not recalled in proper order." (Tr. pp. 9 and 10.)

When the Appellant refused to comply with the award of the arbitrator, the Appellees instituted the instant action below which, after judgment for Plaintiffs and Appellees, resulted in this appeal.

SPECIFICATION OF ERRORS

I

The Court erred in finding that the arbitrator did not exceed the scope of the submission to him since the arbitrator's opinion plainly demonstrated that he could find no contract language to support his award

but, instead, relied on statements by a Company supervisor and a practice in 1959 in making his decision.

II

The Court erred in holding that the arbitrator's award was ambiguous in that he might have construed the word "curtailment" to include strikes when the arbitrator's decision clearly indicates that he understood and appreciated the difference between "lay-offs" or curtailments and strikes.

III

The Court erred in holding that the arbitrator was interpreting the contract in reaching his decision when the fair impact of his decision is that in the absence of contract language he determined how the men should have been recalled on a basis of one prior strike, the statements of agents of the parties and by establishing an estoppel against the Appellees and relying upon any contract language to support their later position in view of their prior statements.

IV

That the Court erred in entering judgment for Appellees for the reason that the arbitrator exceeded the scope of the submission and made his award not upon contract language but upon his notion of how the recall should have been handled based upon the prior statements and actions of the parties or their agents.

ARGUMENT

SUMMARY

Appellant's argument will be in two parts. The first portion will be addressed to the contention the arbitrator exceeded the scope of the submission and of his authority by basing his award not upon an interpretation of the meaning of contract language but rather upon his notion of what the parties agreed when the strike settlement accord of January 31, 1964, was reached.

The second portion of the argument will concern the proposition that the arbitrator's decision is not ambiguous and if construed to be an interpretation of the seniority provisions of the collective bargaining agreement is so unreasonable as to be arbitrary and capricious and therefore void.

THE ARBITRATOR EXCEEDED THE SCOPE OF HIS SUBMISSION IN GOING OUTSIDE OF THE COLLECTIVE BARGAINING AGREEMENT TO MAKE HIS AWARD.

The arbitrator in the course of his decision unequivocally found that no specific contract provisions relate to the order or recall of employees after strikes. (Tr. p. 7.) Equally important he did not designate any portion of the contract which he thought might be interpreted to govern recall after strikes.

He did, however, find three circumstances significant:

1. That a Company superintendent had stated that departmental seniority would be observed during the post-strike recall (Tr. p. 8);

2. That the union representatives did not request or insist upon plant seniority as the proper order of recall (Tr. p. 8); and

3. That following the 1959 strike the Company followed departmental seniority in its order of recall (Tr. p. 8).

Basing his decision upon these three circumstances, the arbitrator found that (1) because the Company representatives had said departmental seniority would be observed the Company must be held as having so interpreted the agreement and (2) because the unions had apparently acquiesced in such order of recall, they were estopped to later argue for plant seniority. (Tr. p. 9.)

A fair reading of the arbitrator's decision impels the conclusion that it is based not upon any contract language but rather upon his belief that the parties had at their January 31, 1964, meeting by their words and conduct entered into an agreement as to the order of recall.

While he may have been correct in reaching such conclusion, this was not the question he was to answer which was in essence had the Company violated any provision of the existing collective bargaining agreement in its recall of strikers. Nor did he answer this question by indicating his understanding of the different constructions placed in the agreement by the parties since the question related to what the contract actually provided rather than who should be estopped by words or conduct.

Since it is so apparent that the arbitrator did not draw his award from the essence of the bargaining agreement itself but rather from the conduct of the parties it is submitted that *Steelworkers v. Enterprise Corporation,* 363 U.S. 593 is controlling in light of the holding at p. 597 as follows:

> "* * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The corollary notion was expressed in *Corey v. General Electric Company,* 315 F. 2d 499 at p. 508 where it is said:

> "* * * Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award."

See also:

The Torrington Co. v. Metal Products Workers Union, 237 F. Supp. 139.

While there is no contention that Mr. Tongue did not labor mightily to do equity in his award, the present dispute reveals the evils inherent in the practice of arbitrators attempting to dispense their brand

of industrial justice which was scored in *Steelworkers v. Enterprise Corp.*, supra.

Beyond doubt the problems resulting from attempting to reactivate a struck or shut-down plant are so different from those flowing from the reversal of a curtailment or lay-off as to preclude any attempt to make an agreement with respect to one situation applicable to the other.

The wisdom behind the policy denying an arbitrator the right to determine what the parties would have agreed to in a situation they did not contemplate but which has occurred cannot be more graphically demonstrated than in the present case.

The problems arising from reopening of a struck plant, such as repair of plant prior to engaging in production and related matters indicate that the subject of priority of recall is one for negotiation between employer and union rather than for subjective determination by an arbitrator, however fairly motivated.

The parties bargained for an arbitrator to interpret their agreement not to fashion one to cover an unanticipated hiatus. For these reasons the arbitrator's award should be vacated.

THE ARBITRATOR'S DECISION IS NOT AMBIGUOUS

The Court below in concluding that the arbitrator might have read the word "curtailment" to include strike went to the provisions of Section 7 of Article

7 of the collective bargaining agreement to sustain this position. (Tr. p. 84.)

This provision in pertinent part reads:

"Section 7. Layoffs in a Department:

(a) When it is necessary to curtail the work force in a department or a department subdivision, the employee at the bottom of the applicable seniority list shall be the first to be curtailed. His plant seniority shall then govern as to whether he shall be retained in the plant or curtailed from the plant. The Company will furnish the local Union a list of those employees who are laid off.

(b) In recalling employees after a curtailment, they shall be recalled as closely as possible in the reverse order to that described in part (a) of this Section, provided they can perform the work available."

A reading of the section can leave no doubt that the situation resulting from strike or other shutdown is not contemplated nor intended to be provided for in this part of the agreement.

Even so there might be room to feel that such construction of the arbitrator's decision were possible were it not for his unqualified expression to the contrary when he says in his award:

". . . Suffice to say for the purposes of this case that they provide, among other things, for both 'plant seniority "and" departmental seniority'; that in the event of *layoffs* in a department, plant seniority is to prevail in recalling em-

> ployees to work, and that there are no specific provisions relating to order of recalling employees after *strikes.*" (Tr. p. 7; emphasis added.)

It is submitted that nothing could better reveal the awareness of the arbitrator of the distinction between "lay-off" and "strike" than his own review of the contract seniority provisions.

Since the arbitrator does not seek to identify any portion of the collective bargaining agreement as compelling his decision, we submit that the Court below is in no better position to do so.

CONCLUSION

Appellant submits that an objective reading of the arbitrator's award requires a conclusion that it is based upon his subjective judgment as to what was fair based upon the statements and conduct of the parties rather than upon any formal collective agreement. As such, the award must fall as it does not flow from the essence of the collective bargaining agreement and exceeds the scope of the submission.

Further, the decision of the arbitrator is not ambiguous and, if deemed to be a construction of Section 7 of Article 7, is so unreasonable as to be arbitrary or capricious. See *International Association of Machinists v. Hayes Corp.,* 296 Fed. 2d 238 at p. 243.

We urge this Court then to reverse the Judgment of the Court below and to vacate the Arbitrator's award for the reasons advanced.

Dated, Butte, Montana,
February 1, 1968.

Respectfully submitted,
R. Lewis Brown, Jr.,
Attorney for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeal for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. Lewis Brown, Jr.,
Attorney for Appellant.